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No. 95-223

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

CINCINNATI INSURANCE COMPANY,
Petitioner,

v.

ORANGEBURG SAUSAGE COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the South Carolina Court of Appeals

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF FOR THE AMERICAN COUNCIL OF LIFE INSURANCE IN SUPPORT OF THE PETITION

Of Counsel:
PHILLIP E. STANO
AMERICAN COUNCIL OF
LIFE INSURANCE
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 624-2183

PATRICIA A. DUNN
Counsel of Record
STEPHEN J. GOODMAN
DARA LUTZ
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939
Counsel for the Amicus

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MOTION FOR LEAVE TO FILE BRIEF FOR THE AMERICAN COUNCIL OF LIFE INSURANCE AS AMICUS CURIAE IN SUPPORT OF THE PETITION

The American Council of Life Insurance ("ACLI") hereby moves, pursuant to Rule 37.2 of the Rules of this Court, for leave to file the attached brief as *amicus curiae*. Counsel for the petitioner has consented to the filing of this brief; counsel for the respondent has refused consent.

The American Council of Life Insurance ("ACLI") is the largest life insurance trade association in the United States, representing the interests of more than 600 member life insurance companies. These companies currently

underwrite 90.9 percent of the life insurance in force in legal reserve life insurance companies in the United States.

Defining the procedural and substantive limitations that the Due Process Clause of the Fourteenth Amendment imposes on punitive damages is an issue of vital importance to ACLI's members. In recent years, courts have permitted juries to assess substantial punitive damages awards against life insurers, often in the absence of due process constraints, and have deferred to those awards even though they are imposed without meaningful standards and bear no rational, objective relationship to the purposes of punishment and deterrence. These decisions drastically and unpredictably enlarge the risks facing life insurers, which must rely on a predictable allocation of risks and costs in providing insurance, and jeopardize their ability to offer affordable insurance.

Consequently, ACLI's members have a particular interest in one of the questions presented by the petition for certiorari in this case: the kind of review that appellate courts must provide in deciding whether a jury's award of punitive damages is constitutionally excessive.* Because of its nationwide constituency, ACLI is uniquely able to provide this Court with the views of the life insurance industry concerning this issue and to offer additional arguments underscoring the importance of this Court's review. In other cases involving the constitutionality of current punitive damages law, ACLI has filed *amicus* briefs in this Court. *See, e.g., BMW of North America, Inc. v. Gore*, 115 S. Ct. 932 (1995) (granting writ of certiorari); *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994); *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991); *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989); *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71

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* Question No. 1(e) presented in the petition for certiorari.

(1988); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986). For these reasons, the Court should grant this motion for leave to file the attached brief *amicus curiae* in support of the petition for certiorari.

Respectfully submitted,

Of Counsel:
PHILLIP E. STANO
AMERICAN COUNCIL OF LIFE INSURANCE
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 624-2183

September 1995

PATRICIA A. DUNN
Counsel of Record
STEPHEN J. GOODMAN
DARA LUTZ
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939
Counsel for the Amicus

QUESTION PRESENTED

What are the factors that appellate courts must, at a minimum, consider when reviewing a punitive damages award to determine whether it is so excessive as to violate the Due Process Clause?

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BRIEF FOR THE AMERICAN COUNCIL OF LIFE INSURANCE AS AMICUS CURIAE IN SUPPORT OF THE PETITION

INTEREST OF THE AMICUS

As stated in the motion accompanying this *amicus* brief, the American Council of Life Insurance ("ACLI") is the largest life insurance trade association in the United States, representing the interests of more than 600 member life insurance companies. These companies currently underwrite 90.9 percent of the life insurance in force in legal reserve life insurance companies in the United States.

It is important to the members of ACLI that this Court clarify the kind of review that appellate courts must provide in deciding whether a jury's award of punitive damages is constitutionally excessive.[1] When juries assess substantial punitive damages awards against life insurers, and appellate courts fail to scrutinize those awards in an appropriate manner, the result is often approval of an award that bears no rational, objective relationship to the purposes of punishment and deterrence. Such decisions drastically and unpredictably enlarge the risks facing life insurers and jeopardize their ability to offer affordable insurance. ACLI thus files this brief to provide the Court with its unique perspective, based on the experiences of its broad-based constituency, regarding the issue of appropriate appellate review and to offer additional arguments underscoring the importance of this Court's review.

STATEMENT

1. Because Petitioner sets the facts forth fully in the petition for certiorari, ACLI only summarizes the facts here. Respondent Orangeburg Sausage Company ("OSCO") is a corporation that sells food products. Its facilities, which are located on High Street in Orangeburg, South Carolina, include a freezer building, in which frozen foods are stored and, on the other side of the street, its offices, slaughtering facilities, and a retail market. Appendix to Petition for Certiorari ("Pet. App."), at 3-4.

Petitioner Cincinnati Insurance Company ("Cincinnati"), which provided coverage at the premises beginning in 1983, wrote a one-year renewal policy, in 1988, which provided coverage of (1) $75,000 for property and $230,000 for contents at 597 High Street and (2) $75,000 for property and $30,000 for contents at 488 High Street. Pet. App. 4-6. Cincinnati believed that 597 High Street was the address for the offices, slaughtering

[1] Question 1(e) presented in the petition for certiorari.

facilities, and retail market, while 488 High Street was the address for the freezer building. Petition for Certiorari ("Pet."), at 12-13. However, OSCO later asserted that 597 High Street was the correct address for all of OSCO's buildings, and that Bryant, the insurance agent contacted by OSCO, had erred in requesting coverage at "488 High Street." Pet. 12.

In September, 1989, Hurricane Hugo caused approximately $250,000 in damage to frozen foods stored in the freezer building. Pet. App. 7-8. Cincinnati took the position that the policy, as written, provided only $30,000 of coverage for the contents of the freezer building, and eventually sent OSCO a check for $36,006.09. Pet. App. 9-11. OSCO asserted that it was entitled to substantially more than that.

2. OSCO filed suit against Cincinnati and Bryant in the Court of Common Pleas for Orangeburg County, South Carolina ("the trial court"), claiming that Cincinnati was liable for breach of contract and bad faith and that, in the alternative, both Bryant and Cincinnati were liable for negligent procurement, based upon Bryant's failure to obtain the proper coverage for OSCO. Pet. App. 2; Pet. 16-17. By agreement, the trial was bifurcated, with the jury first deciding the claims for actual damages and then, after a separate hearing, the claims for punitive damages. Pet. App. 3. In the actual damages phase of the trial, the jury awarded OSCO $800,000 against both Bryant and Cincinnati on the negligent procurement claim. *Id.* at 2.[2] In the punitive damages phase of the trial, OSCO elected to proceed solely against Cincinnati. Pet. 23. After a brief hearing, the jury awarded OSCO $1,630,000 in punitive damages. Pet. App. 3.

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[2] The jury also awarded actual damages of $254,029.73 on the breach of contract claim and $250,000 on the bad faith claim. Pet. App. 2. However, following the verdict on actual damages, the trial court required OSCO to elect its grounds of recovery, and OSCO chose to recover under the negligent procurement theory. *Id.* at 3.

3. Cincinnati filed various post-trial motions, including motions to vacate the award of punitive damages, for a new trial *nisi remittitur*, and for post-verdict review of the punitive damages award. Pet. App. 55; Pet. 28.[3] The trial court then conducted a post-trial review of the punitive damages award, pursuant to *Gamble v. Stevenson*, 406 S.E.2d 350 (S.C. 1991), which sets forth a list of discretionary factors that trial courts may consider in determining whether a jury's award of punitive damages is excessive. Pet. App. 55. The trial court concluded that the award was proper. *Id.*

4. Cincinnati appealed the award of punitive damages, among other issues, to the South Carolina Court of Appeals ("the Court of Appeals"). Pet. App. 3. Citing *Gamble*, which requires appellate courts to employ an "abuse of discretion" standard in reviewing trial court rulings concerning the excessiveness of punitive damages, the Court of Appeals upheld the punitive damages award. In support of that conclusion, it first recited the findings of the trial court and then, without offering any independent analysis, held (1) that "[a]fter carefully reviewing the record, we agree with the trial court's analysis" and (2) that "the trial court reviewed both the actual and punitive damages awards and found them to be within reasonable limits . . . Accordingly, we affirm the punitive damage award." Pet. App. 23-24 (citations omitted).

5. Cincinnati filed a petition for certiorari with the South Carolina Supreme Court, in which it argued, among other things, that the jury's award of punitive damages was excessive and that the Court of Appeals had not provided the kind of meaningful appellate review approved by this Court in *Haslip*. The petition for certiorari was denied. Pet. App. 41-42.

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[3] In South Carolina, the vehicle for seeking a remittitur from the trial court is to file a motion for new trial *nisi remittitur*. If the trial court reduces the award, the plaintiff must either accept the reduction or submit to a new trial.

REASONS FOR GRANTING THE WRIT

In *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), this Court held that Alabama's procedures for assessing and reviewing punitive damages awards satisfied the requirements of the Due Process Clause. Because *Haslip* approved Alabama's procedures in their entirety, without specifying exactly which procedures were necessary to meet constitutional standards, questions have since arisen, in both South Carolina and other states, as to whether procedures other than Alabama's also satisfy the requirements of the Due Process Clause. *See, e.g.*, *Gamble v. Stevenson*, 406 S.E.2d 350, 353 (S.C. 1991) ("Apart from determining that Alabama's scheme for awarding punitive damages passes constitutional muster, however, the *Haslip* Court provided 'no guidance as to whether any *other* procedures are sufficiently reasonable' ")[4]; *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 900 (Tenn. 1992) ("While the Court upheld the particular method employed by the Alabama courts in [*Haslip*], it was not entirely clear whether the majority was giving its carte blanche approval to the common law scheme"); *Hanson v. American Nat'l Bank & Trust Co.*, 865 S.W.2d 302, 310 (Ky. 1993) (*Haslip* "did not identify the parameters the trial court and appellate court should apply in insuring that an award of punitive damages meets the test of due process"); *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 12 n.1 (Tex. 1994) ("The manner and extent to which due process requires procedural safeguards and substantive limits on punitive damages is a matter of continuing controversy throughout the United States").

This case brings to the Court one of the resulting issues: namely, which of the factors mentioned in *Haslip* appellate courts must, at a minimum, consider when deciding whether punitive damages awards are excessive. Although

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[4] Citing *Haslip*, 499 U.S. at 24 (Scalia, J., concurring) (emphasis in original).

Haslip apparently held that appellate courts must consider "detailed" and objectively measurable criteria when deciding whether punitive damages awards are excessive, a number of state courts have construed *Haslip* differently, and have concluded that much more limited appellate review is sufficient to satisfy the requirements of the Due Process Clause. Consequently, absent this Court's review, appellate courts, like those in South Carolina that have yet to disturb a punitive damages award since *Haslip*, will continue to approve punitive damages awards based on limited and virtually standardless review of those awards.

DESPITE THIS COURT'S DECISION IN *HASLIP*, WHICH APPARENTLY REQUIRES APPELLATE COURTS TO CONSIDER A NUMBER OF SPECIFIC FACTORS IN DETERMINING WHETHER AN AWARD OF PUNITIVE DAMAGES IS SO EXCESSIVE AS TO VIOLATE THE DUE PROCESS CLAUSE, MANY APPELLATE COURTS FAIL TO CONSIDER SOME OR ALL OF THOSE FACTORS IN DETERMINING WHETHER AN AWARD OF PUNITIVE DAMAGES IS EXCESSIVE.

When approving Alabama's procedures in *Haslip*, the Court emphasized that when reviewing punitive damages awards for excessiveness, the Alabama Supreme Court "first undertakes a comparative analysis . . . then applies the detailed substantive standards it has developed for evaluating punitive awards [as set forth in *Green Oil Co. v. Hornsby*, 539 So.2d 218, 223-224 (Ala. 1989)]." [5]

[5] Those standards were as follows: "(a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the

499 U.S. at 21. In an accompanying footnote, it noted that the application of these specific standards "distinguishes Alabama's system from the Vermont and Mississippi schemes about which Justices expressed concern in [prior cases] . . . . In those respective schemes, an amount awarded would be set aside or modified only if it was 'manifestly and grossly excessive' . . . or would be considered excessive when 'it evinces passion, bias and prejudice on the part of the jury so as to shock the conscience' . . . ." *Id.* at 21 n.10 (citations omitted). Finally, it noted that in the case under review, the Alabama Supreme Court had provided "appropriate" review of the punitive damages award, bringing "to bear all relevant factors recited in *Hornsby*." *Id.* at 23.

South Carolina's system appears to be more like the Vermont and Mississippi schemes that the Court questioned in *Haslip* than like the Alabama scheme that the Court approved. In South Carolina, appellate courts reviewing punitive damages awards to determine whether they are so excessive as to violate the Due Process Clause are not required to apply all relevant factors set forth in *Haslip*. Indeed, South Carolina appellate courts apparently are not required to apply *any* of those factors. Rather, in *Gamble, supra,* the South Carolina Supreme Court held that in order to comply with the requirements of *Haslip,* trial courts must conduct a post-trial review of a jury's punitive damages award and "may" consider a number of enumerated factors in doing so. 406 S.E.2d at 354.[6] However, appellate review of the trial court's

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'financial position' of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation." 499 U.S. at 21-22 (paraphrasing *Hornsby*).

[6] Those factors are: "(1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or con-

determination is "limited." *Id.* at 355. "Only when the trial court's discretion is abused, amounting to an error of law, does it become the duty of this Court to set aside the award." *Id.* (citation omitted). Although this formulation does not make clear exactly what factors appellate courts are to consider in reviewing punitive damages awards, it is clear that appellate review in South Carolina falls far short of the procedures that this Court approved in *Haslip*.

First, it appears that South Carolina appellate courts are in fact not required to consider any of the factors set forth in *Gamble*. Certainly, South Carolina trial courts are not required to consider those factors. See *Gamble*, 406 S.E.2d at 354 (trial courts "may" consider those factors); *Weir v. Citicorp Nat'l Services, Inc.*, 435 S.E.2d 864, 869 (S.C. 1993) ("*Gamble* specifically states the trial court *may* consider the factors. Under *Gamble*, the trial court is not required to make findings of fact for *each* factor"). And if consideration of these factors is optional for trial courts, then it seems reasonable to presume that consideration of these factors is also optional for appellate courts, whose power of review is more "limited" than that of trial courts. *Gamble*, 406 S.E.2d at 355.

Second, even assuming, *arguendo*, that South Carolina appellate courts are required to consider the factors listed in *Gamble* when reviewing punitive damages awards for excessiveness, those factors do not include a number of important criteria mentioned in *Haslip*. *Gamble* does not require reviewing courts to consider the size of awards allowed in similar cases, although that is important infor-

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cealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and finally, (8) as noted in *Haslip*, 'other factors' deemed appropriate." 406 S.E.2d at 354.

mation that the jury making the award will not have.[7] Nor does *Gamble* require reviewing courts to consider the degree to which the defendant has previously been punished for the same conduct, although doing so is obviously an important safeguard against multiple and excessive punishment for the same conduct.[8]

In the absence of meaningful appellate review in South Carolina, many defendants—such as ACLI members operating in South Carolina—face deprivation of the due process rights recognized in *Haslip*. Indeed, review of the post-*Gamble* cases in which South Carolina appellate courts have entertained challenges to the size of punitive damages awards suggests that their review is largely standardless. Most of the cases (including the South Carolina Court of Appeals' decision in the present case) do no more than state in a conclusory fashion that the award was not "excessive" or that the trial court did not commit "error" in its review of the award. *See Gamble*, 406 S.E.2d at 355 ($87,500 punitive damages award) (holding that the award was not "excessive" and that the defendant's conduct "could well have been considered by the jury to be reprehensible"); *Kinard v. Crosby*, 433 S.E.2d 835, 839 (S.C. 1993) ($444,000 punitive damages award) (holding that the award "was amply supported by the evidence of record" and not "excessive"); *Weir*, 435 S.E.2d at 869 ($500,000 punitive damages award, remitted by trial court to $275,000) (holding that the award was not "grossly excessive, especially in light of [the defendant's] net value" and that "after carefully

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[7] As noted in *Haslip*, the Alabama Supreme Court does make such an analysis. *See* 499 U.S. at 21; *Aetna Life Ins. Co. v. Lavoie*, 505 So.2d 1050, 1053 (Ala. 1987).

[8] The Alabama Supreme Court, as indicated in *Haslip*, considers "the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation" and "the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation." 499 U.S. at 22.

reviewing the record, we find no error in the trial judge's review of the punitive award"); *Washington v. Whitaker,* 451 S.E.2d 894, 898 (S.C. 1994) ($225,000 punitive damages award) (holding that "the punitive damage award against [a defendant] was not unduly excessive or against the weight of the evidence"); *Constant v. Spartanburg Steel Prod.,* 447 S.E.2d 194, 197 (S.C.), *cert. denied,* 115 S. Ct. 580 (1994) ($100,000 punitive damages award) (finding that the verdict was not "grossly excessive"); *McCourt v. Abernathy,* 457 S.E.2d 603, 608 (S.C. 1995) (punitive damages awards of $1 million against one defendant and $500,000 against the other) (finding "no abuse of the trial judge's discretion" and "no error"); *Caldwell v. K-Mart Corp.,* 410 S.E.2d 21, 25 (S.C. Ct. App. 1991) ($100,000 punitive damages award) (award was not "grossly excessive"); *Hansel v. National States Ins. Co.,* 437 S.E.2d 159, 162 (S.C. Ct. App. 1993) (amount of punitive damages award not stated) ("We conclude the review conducted [by the trial court] in this case fulfills the requirements of *Gamble*"); *Perry v. Green,* 437 S.E.2d 150, 153 (S.C. Ct. App. 1993) ($50,000 punitive damages award) (finding "no abuse of discretion" because there was "ample evidence in the record to support the jury's verdict"); *Hendrix v. Eastern Distribution, Inc.,* 446 S.E.2d 440, 448 & n.5 (S.C. Ct. App. 1994) ($150,000 punitive damages award) (holding that there was "no abuse of discretion in this case" and noting that the punitive damages award apparently represented the jury's attempt to punish the defendant by removing the profits that it had made as a result of its unlawful conduct); *Orangeburg Sausage Co. v. Cincinnati Ins. Co.,* 450 S.E.2d 66, 73 (S.C. Ct. App. 1994) ("After carefully reviewing the record, we agree with the trial court's analysis").

As a result, South Carolina appellate courts do not appear to be providing the kind of meaningful appellate review envisioned by this Court in *Haslip.* In *Haslip,* the

Court took pains to emphasize that "postverdict review by the Alabama Supreme Court has resulted in reduction of punitive awards." 499 U.S. at 22. But ACLI has been unable to find a single case, decided since *Gamble*, in which a South Carolina appellate court reversed or otherwise disturbed a punitive damages award on the grounds that it was excessive.[9]

Nor is this problem confined to South Carolina. Courts in a number of other states have also interpreted *Haslip* to permit standards of appellate review that seem to fall well short of the standards required by *Haslip*. *See, e.g., Hospital Auth. of Gwinnett County v. Jones*, 409 S.E.2d 501, 503-504 (Ga. 1991) (refusing to consider either the defendant's financial position or the profitability of the wrongful conduct and adding that punitive damages comport with due process because of their "historical acceptance," not because they "can be accurately measured and adjusted by court imposed guidelines"), *cert. denied*, 502 U.S. 1096 (1992); *Ivy v. General Motors Acceptance Corp.*, 612 So.2d 1108, 1116 (Miss. 1992) (reaffirming a prior decision which did not require reviewing courts to consider any specific or measurable factors other than the defendant's wealth and ability to pay);[10] *Rodebush v.*

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[9] *See* the cases discussed in the preceding paragraph.

[10] *Ivy* reaffirmed the Mississippi Supreme Court's pre-*Haslip* decision in *Andrew Jackson Life Ins. Co. v. Williams*, 566 So.2d 1172, 1190 (Miss. 1990), where that court announced that the "quantum" of a punitive damages award is measured by considering the following "general" factors:

> First, the amount awarded should serve to punish the [defendant] and to deter it from committing similar offenses in the future. Second, the amount should serve as an example set to deter others from committing similar offenses. Third, the amount awarded should account for the [defendant's] pecuniary ability and financial worth. And fourth, the amount constitutes compensation for the plaintiff for his or her "public service" in bringing the action.

Clearly, these factors fall far short of the "detailed substantive standards" approved by the Court in *Haslip*. With the exception

Oklahoma Nursing Homes, Ltd., 867 P.2d 1241, 1251 (Okla. 1993) (list of factors to be considered does not include the size of awards allowed in similar cases or the degree to which the defendant has previously been punished for the same conduct); *Alexander & Alexander, Inc. v. B. Dixon Evander & Assocs. Inc.*, 596 A.2d 687, 708-710 (Md. Ct. Spec. App. 1991) (same).[11]

Only this Court can resolve the questions that have arisen since *Haslip* was decided and make clear, once and for all, what factors appellate courts must consider, at a minimum, in order to comply with the Due Process Clause.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

Of Counsel:
PHILLIP E. STANO
AMERICAN COUNCIL OF
LIFE INSURANCE
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 624-2183

PATRICIA A. DUNN
Counsel of Record
STEPHEN J. GOODMAN
DARA LUTZ
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939
Counsel for the Amicus

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of the factor relating to the defendant's wealth, they are wholly conclusory in nature and fail to provide objective, measurable guidelines for determining excessiveness. Particularly noteworthy is the absence of any requirement that there be a reasonable relationship between the punitive damages award and the harm that has resulted or was likely to result from the defendant's conduct.

[11] Indeed, the Court of Special Appeals "carefully eschew[ed] any desire, or need, to engage in" an analysis of the awards rendered in other cases. 596 A.2d at 711.